BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below

The opinion of the Court below was rendered on April 27, 1945. The opinion of the Supreme Court of California is not yet reported in the California Reports, but appears as 26 Cal. A. C. page 215.

Grounds on Which Jurisdiction of the Supreme Court of the United States Is Involved

The judgment of the Supreme Court of the State of California was rendered on April 27, 1945. Petition for rehearing was not filed due to lapse of statutory time. The judgment of the Supreme Court of California is based upon its application of Sect. 9608 of the Government Code. The jurisdiction of the Supreme Court of the United States is invoked under Article 1, Section 9, para. 3 of the Constitution of the United States, and the 5th and 14th amendments to the Constitution of the United States.

Statement of the Case

The facts on which the application was based are as follows:

(a) In the month of February, 1943, a complaint was filed in the respondent court charging petitioner and one Philip Webster with the crime of misdemeanor, to wit: violating section 182 of the Penal Code by conspiring together to violate section 153 of the Penal Code, alleged to have been committed on January 23, 1943.

(b) Petitioner entered his plea of not guilty to said charge and was tried, before a jury, in respondent court from March 25 to 27 inclusive, the jury on said last men-

tioned date returning a verdict finding petitioner guilty as charged.

(c) On March 30, 1943, the Hon. Paul Helmore, the Justice of the Peace presiding at said trial, pronounced and rendered judgment on said verdict, sentencing petitioner to imprisonment in the county jail of Marin County.

(d) That thereafter petitioner duly and regularly perfected his appeal from the said judgment to the Superior Court of the State of California, in and for the County of Marin. That said appeal was regularly pending before said superior court and the judge thereof affirmed the judgment. That the execution of said judgment was stayed pending said appeal.

(e) Following the affirmance of said judgment, petitioner procured from respondent court a stay of the execution of said judgment in order to make application for the writ herein prayed for. That petitioner has been and now is at liberty on bail since the rendition of said judgment.

(f) That at the time of the filing of said complaint, the rendition of said judgment and the taking and perfecting of petitioner's appeal from said judgment, the offense with which petitioner was charged was a MISDEMEANOR triable on complaint filed in a Justice's Court; that while said appeal was pending in said superior court the Legislature amended section 182 of the Penal Code by making it a FELONY to conspire to violate section 153 of the Penal Code. That by said amendment the Legislature repealed the law under which Petitioner was charged, tried and convicted, said repeal being without any saving clause as to offenses committed prior to said amendment and repeal.

(g) That from and after the said amendment and repeal of section 182 of the Penal Code, the respondent court has

been and is now without jurisdiction over the person of petitioner and has been and now is without jurisdiction, power or authority to carry into effect or execute, or make any orders carrying into effect or executing, the judgment so made and rendered as aforesaid. That despite the repeal of the said law and statute under which petitioner was convicted, said respondent court threatens and intends, and, unless prohibited by this Court from so doing, will cause said judgment against petitioner to be executed and carried into effect and will make all necessary orders and commitments for the purpose of carrying said judgment into effect and executing the same.

(h) The petitioner has no plain, speedy or adequate remedy in the ordinary course of the law; that no further appeal to any court lies from the judgment so pronounced against him; that unless the writ of certiorari issues, as prayed for, petitioner will suffer great and irreparable injury and will be deprived of his liberty without due process of law and imprisoned in the county jail to serve a sentence that has become void.

Specification of Errors

The Supreme Court of the State of California erred in holding that as a matter of law, the judgment and sentence as passed by respondent court was not void and unenforceable, and that Section 9608 of the Government Code of the State of California operating as a savings clause, saving the punishment and prosecutions for misdemeanors instituted by complaint, instead of those specifically set out in said section, to wit: indictment and information, specifically referring to felonies.

ARGUMENT

The opinion of the Supreme Court of California erred in holding that as a matter of law the judgment and sentence of the respondent court were enforceable, and not in violation of Article 1, Section 9, Para. 3 of the Constitution of the United States, and the 5th and 14th amendments thereto.

The question involved is as to the power of the Justice's Court to execute a judgment and sentence of imprisonment where the statute, under which petitioner was convicted, has been repealed pending an appeal from the judgment of conviction.

Petitioner contends that under such circumstances the trial court is without jurisdiction to enforce the judgment.

Effect of Repeal of Criminal Statute Pending Appeal

Where a criminal statute is repealed, without a saving clause, the proceedings against any defendant are terminated at the instant of such repeal. The effect of such repeal has been announced by our Supreme Court as follows:

> " 'If a penal statute is repealed pending an appeal, and before the final action of the appellate court, it will present an affirmance of a conviction, and the prosecution must be dismissed, or judgment reversed.' (Sutherland on Statutory Construction, sec. 166.) The proceeding is arrested at the very point where it is at the date of the repeal; if before indictment no indictment can be found; if after indictment, and before trial, no conviction can be had; if after conviction and before judgment, no judgment can be rendered. If the judgment is appealed from, and its enforcement is suspended until the determination of the appeal, the power to enforce the judgment falls with the repeal of the statute, and the appellate court will direct a dismissal of the proceedings. Until the determination of the appeal, the proceeding is pending in court, and the

judgment does not become final until affirmed by the appellate court. If, during the interim, the legislature repeals the statute under which the prosecution is had it operates as a discharge of the defendant. 'The repeal of the law imposing the penalty is of itself a remission.' "

Spears v. *County of Modoc,* 101 Cal. 303, 305.

To the same effect is the case of *People* v. *DeFerrari,* 63 Cal. App. 671, 673.

The Offense of Misdemeanor Conspiracy Was Repealed in 1943

Defendant was tried and convicted under section 182 of the Penal Code of a misdemeanor conspiracy. At the time of the alleged offense, trial and judgment, section 182 of the Penal Code provided various punishments for conspiring to commit various described acts. The offense involved herein was a conspiracy to violate section 153 of the Penal Code. Section 153 P. C. is a misdemeanor and a conspiracy to commit this crime was punishable in the same manner as for the commission of the crime itself.

In 1943 the Legislature amended section 182 of the Penal Code by making a conspiracy to commit any of the offenses denounced by that section a felony. Thus, at the present time, all criminal conspiracies are felonies to be prosecuted and punished by proceedings instituted in the Superior Court. Justices' Courts no longer have jurisdiction of any such offense.

It is fundamental that a statute which prescribes a different penalty for an offense operates as a repeal of the prior statute.

"A later statute prescribing a different punishment for an offense works a repeal of the former one by implication. (People v. Tisdale, 57 Cal. 104.)"

People v. *Lewis,* 4 Cal. App. (2d) Supp. 778.

section 182 P. C. changing the punish-
The amendment of he offense from a misdemeanor to a
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In California the olitical Code, which reads as follows:
Section 329 of the of any law creating a criminal offense

> "The repeal tute a bar to the indictment or infor-
> does not const nishment of an act already committed
> mation and pu the law so repealed, unless the inten-
> in violation of h indictment or information and pun-
> tion to bar su ressly declared in the repealing act."
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Government Code, with some slight
Section 9608, g, is identical with former Section 329
change of wordi

of the Political Code, and as this last section has been construed by our courts the same construction must apply to the section of the Government Code (23 Cal. Jur. p. 795, Sec. 173).

It will be noted that the foregoing general saving clauses do not save prosecutions that must be tried on a *complaint* filed in an inferior court. The word "complaint" is not contained in the sections. The words "indictment" and "information" refer to criminal actions commenced and triable only in the Superior Court.

A brief survey of the history of Sec. 329 Political Code and the decisions construing it will demonstrate the correctness of the foregoing statements.

The State Constitution of 1849, Art. I, Sec. 8, provided that "No person shall be held to answer for a capital or otherwise infamous crime, * * * unless on presentment or indictment of a grand jury."

On adoption of the Criminal Practice Act in 1850-51 it was provided as to what offenses had to be prosecuted by indictment and those that could be instituted by filing a complaint. Informations, as we now know them, were unknown. These sections of the Practice Act were as follows:

> "177. All public offenses prosecuted in the district court and the courts of sessions, must be prosecuted by indictments, * * *."
>
> "608. All proceedings and actions before a justice's, recorder's, or mayor's court, for a public offense, of which said courts have jurisdiction, shall be commenced by complaint setting forth the offense charged, * * *"

The foregoing sections of the Practice Act remained unchanged until the adoption of the codes in 1872, when the following sections of the Penal Code took their places:

> "888. All public offenses triable in the district and county courts, must be prosecuted by indictment, * * *."

> "1426. All proceedings and actions before a justice's or police court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, * * *."

So, from 1850 to 1872, the procedure had been definitely prescribed that proceedings in inferior courts had to be commenced by *complaint*, those in superior courts by *indictment*.

Therefore, when the legislature adopted the Political Code in 1872 it must be presumed that it did so with knowledge of the laws then in existence and the acts of previous legislatures (23 Cal. Jr. Sec. 159, p. 783). In 1872 the legislature enacted Sec. 329 of the Political Code, which then read:

> "The repeal of any law creating a criminal offense does not constitute a bar to the indictment and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment and punishment is expressly declared in the repealing act."

No mention is made therein of informations, as none existed at that time.

When the legislature thus created a saving statute it limited its application to those cases only that could be prosecuted by indictment; i. e., criminal offenses triable in the district and county courts (now superseded by our superior courts). It did not extend the operation of such statute to offenses triable in justice's or police courts and instituted by filing a complaint.

In 1879 our present Constitution was adopted, and Art. I, Sec. 8, reads as follows:

> "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by

indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once each year in each county."

Here, for the first time, have we a procedure whereby one could be prosecuted by information.

In 1880 the case of *People* v. *Tisdale,* 57 Cal. 104, was decided by the Supreme Court. Tisdale had violated a statute in 1879, making the acts he did a felony. In April of 1880 the statute was amended, changing the punishment and reducing the crime from a felony to an indictable misdemeanor. In May, 1880, an information was filed charging Tisdale with committing the felony. The Supreme Court first held that the amendment constituted a repeal of the statute and then turned to the effect of 329 Political Code on the situation, holding that the word "information" could not be read into the section.

"The real and only question is, whether an information presented after the repeal of a law, which required that a person who violated it should be preceded against by indictment, can be sustained for an offense committed before the repeal. Were it not for Sec. 329 of the Political Code, we should answer this question, without hesitation, in the negative. That section read as follows: 'The repeal of any law creating a criminal offense does not constitute a bar to the indictment and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment and punishment is expressly declared in the repealing act.'

Assuming that by the 'indictment and punishment of an act' is meant the 'indictment and punishment of a person who has committed an act in violation of law,' we would be compelled, in order to uphold the information filed against respondents, to further assume that the Legislature also meant that the repeal of any law creating a criminal offense should not constitute a bar

> to a proceeding by information against a person who had violated such law before it was repealed. As the Political Code which contains the provision referred to went into effect several years before any one could be proceeded against by information for any offense, it will not be claimed that the Legislature which enacted it intended that a person who had violated a law might be proceeded against after its repeal by information." (P. 106.)

The *Tisdale* case is commented on in the case of *People* v. *McNulty*, 93 Cal. 427 at 440, as follows:

> "In People v. Tisdale, 57 Cal. 104, there is some discussion of section 329 of the Political Code; but at the time of the commission of the crime there charged, the defendant would have been proceeded against by indictment only, and not by information; and at the time of the decision, section 329 did not contain the word 'information.' But the defendants were prosecuted by information under a subsequent law; and the court held that section 329 could not be applied, because there was no power to inject into it the word 'information,' * * * ."

Immediately following the decision in the *Tisdale* case, holding that nothing could be injected into Sec. 329, Political Code, this section was amended in 1881 (Stats. 1881, p. 6) by adding the words "or information" after the word "indictment."

The foregoing cases and amendment of Sec. 329 show that judicial and legislative construction of this section is that the words "indictment" and "information" refer only to criminal accusations for offenses triable in the superior court and not to complaints for misdemeanors filed in the inferior courts. This contention is also held to be the law in the case of *United States* v. *Barr*, 4 Saw. 254.

The word "complaint" can no more be read into either Section 329, Political Code, or Section 9608, Government

Code, than the word "information" could have been read into either of them prior to 1881. As these sections are only a saving clause as to the repeal of statutes, the violation of which could only be prosecuted by "indictment or information," neither one is a saving clause for misdemeanors triable on a "complaint" filed in an inferior court such as a Justice's Court.

Conclusion

Petitioner prays that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

ALAN W. DAVIDSON,
Attorney for Petitioner.

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